No. 12,843

United States Court of Appeals

For the Ninth Circuit

ILENE CHARLES, also known as Arlene Charles,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

CLOSING BRIEF FOR APPELLANT.

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Table of Authorities Cited

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Since the above-entitled case came up on appeal, this court has rendered its decision in *Cavness v. United States,* 187 F. (2d) 719 (No. 12,514). Appellee contends this decision disposes of the questions presented here. We do not agree.

We have no fault to find with the opinion in the *Cavness* case. It is distinguishable from the case at bar in important particulars. Officers in arresting Cavness found several capsules of narcotics on or near him. They were taken in possession by Narcotic Agent William K. Wells and on the trial were identified and put in evidence (see Record No. 12514, pp. 60-65 and pp. 347 and 348). The judge and the jury

had the capsules before them, with the testimony of Mr. Wells that they were in the same condition as they were when found. An examination of them made it apparent that *no revenue stamps were affixed to them.* This court held that upon this showing a *prima facie* case had been made out.

On *Beland v. United States,* 100 Fed. (2d) 289, the court said:

> "Under the Harrison Anti-Narcotic Act (26 U.S.C. 1043(a)) *evidence* that no revenue stamps were affixed to the drugs at time of their delivery is *prima facie* evidence that they were not sold in or from an original stamped package."

In the *Cavness* case that evidence was produced. *In the case at bar it was not.*

It has been frequently said that in the prosecution of an unlicensed dealer in narcotics it is not necessary for the Government to prove that the drugs did not come from an original stamped package—proof almost impossible for the Government to make in most cases. *Flowers v. United States,* 83 Fed. (2d) 78. It is sufficient if proof is made by competent evidence that no revenue stamps were attached to the drugs at time of seizure. Such proof was made in the *Cavness* case. It wasn't even attempted in this case.

Appellee had it in its power, let us assume, to produce the drugs referred to in the information in support of the charge. Failure to do so leaves this case exactly in the same position as *Weaver v. U. S.,* 15 Fed. (2d) 38. In the *Weaver* case the prosecution had the narcotics in its possession in court and even

showed it to a witness, *but did not offer it in evidence* to give the court and jury an opportunity to examine it. Said the court:

> "* * * but the package itself (narcotic package) *was not introduced in evidence* nor does it appear from the record that it was exhibited to the jury." Case reversed.

On the case at bar, as far as the record shows, the drug was not even in court. By no stretch of the imagination could it be said that appellant waived its production. The report of the Government chemist who analyzed the contents of the capsules was put in evidence, without the necessity of calling the chemist. This was done as an accommodation, and that was the extent of any waiver by appellant (R. p. 13).

This is a criminal case and as a condition to conviction the evidence must establish defendant's guilt beyond all reasonable doubt. Defendant is entitled to the presumption of innocence through every step and with respect to every aspect of the case. Appellee failed to furnish the requisite measure of proof to establish appellant's guilt and has asked the court to overlook this *failure of proof* and convict appellant on surmises or inferences, the last being that no stamps were affixed to the drugs referred to in the information. This surmise, assumption or inferences —whatever we want to call it—does not relate to a casual, collateral matter but relates rather to the very crux of the case, the heart of the case, the *sine qua non*. Counsel has offered no excuse for not making this requisite proof, merely saying in his brief (page

3) that it is obvious that stamps could not be attached to capsules in a commode. We do not know that this is so. Certainly, the court cannot take judicial notice that this is so.

Here we meet again with the presumption of defendant's innocence. It stands counterposed to the surmise or assumption or inference counsel wishes the court to make. When one or the other must give way, the presumption of innocence or the presumption of guilt, we feel sure this court will not hesitate to declare in favor of the fundamental concept of justice firmly embraced as the pole star in the administration of criminal law in this country. Appellant is probably not important as an individual, but the primary point of law presented here is of the utmost importance. One dislikes to contemplate the probable consequence, in other cases or at other times, if the stamp of judicial approval is put on this laxity on the part of the prosecution, in proving by competent evidence the guilt of accused beyond all reasonable doubt. The house where the officers entered and searched, 3237 Nimitz highway, was occupied by several people (R. p. 121). The officers did not know who the legal tenant was and apparently did not know if appellant lived there or elsewhere. It will be recalled when officers entered the house she was by the toilet bowl and the officers said she was apparently trying to flush the toilet, to dispose of the capsules (R. p. 18). When the evidence was in and the case submitted, counsel for appellant in argument, stated that the evidence indicated she had possession of the

drug, because of her nearness to it (R. p. 21). (Mere possession is no offense—*Linder v. U. S.*, 268 U.S. 5, 45 Sup. Ct. 446). The point counsel wished to make was that possession or ownership are two different things; that the real offender was the owner—who was not defendant (R. p. 17). This argument after trial has no place in the record and we would not have referred to it but for counsel's attempt to use it against appellant.

Counsel for appellee summarizes his position on page 6 of his brief in four numbered paragraphs, which we will comment on in their order.

1. When possession by the defendant of *unstamped narcotics* has been proved, the burden is on defendant to show lawful possession.

Comment: In this case there was no evidence, oral, physical or demonstrative that the drugs in question *were unstamped.*

2. The defendant freely admitted the narcotics were in her possession.

Comment: Defendant made no such admission at any time. On page 2 of his brief, counsel correctly states: "The defendant made no statement incriminating herself and did not take the stand." (And Narcotic Officer Wells testified (R. p. 16), "We took the defendant down to the vice squad office, warned her of her rights and she refused to answer any question." There is no excuse for this statement by counsel.

3. Her possession of the narcotics, unexplained, as a matter of law, is *prima facie* evidence of violation of the statute.

Comment: We have already discussed this point at some length and will not repeat it here, except to say that if the prosecution had produced any evidence of any kind to prove that the drugs were unstamped, counsel's statement of law would be correct.

4. Under the *Casey* case the venue is in the territory where the drugs were found.

Comment: We discussed the *Casey* case and quoted from it in our opening brief (Brief p. 8) and we submit the question of venue on our presentation of it there.

We submit there has been a failure of proof. Appellant stood before the trial court shielded and protected by the presumption of innocence. The prosecution was required to prove every essential element of the offense, by evidence which the law recognizes as competent; and the failure of the appellee to prove the *sine qua non*—that the drugs were unstamped—leaves the court with but a single duty—to give force and effect to the presumption of innocence and sustain this appeal; and it is so moved.

Dated, Honolulu, Hawaii,
July 6, 1951.

Respectfully submitted,
E. J. Botts,
Attorney for Appellant.